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Regeste

Violation of Art. 11;Pecuniary damage - award; Violation: 11

Erwägungen

E. 11
In one of the buildings that it occupied, the association also housed an inexpensive restaurant and occasionally organised various cultural events.

E. 12
Between 1978 and 1988 most of the flats in the three buildings subsequently occupied by the members of the association had remained empty, as their then owners were not intending to rent them out again.

E. 13
On 9 November 1988 about fifty individuals occupied 14 flats in those three buildings.

E. 14
Following the occupation of their flats, the owners requested the Principal Public Prosecutor of the Canton of Geneva to order the eviction of the squatters, and three orders to that effect were issued on 10 November 1988. However, the eviction was never carried out, notwithstanding a Federal Court judgment of 8 May 1991, which invited the Conseil d'Etat (cantonal government) to enforce the Principal Public Prosecutor's orders. The cantonal authorities did not act upon that judgment, invoking a local policy of tolerating the presence of unlawful occupiers (squatters) provided the owners did not have a building or renovation permit. Confronted with a serious housing shortage in the Geneva area, that policy was directed against the practice of owners who left property vacant for speculative gain and police assistance was thus denied when it would result in leaving the property vacant.

E. 15
From 1992 the owners, who had given up seeking the squatters' eviction, entered into various negotiations with the association with a view to selling it their properties. Attempts in 1996, 1999, 2000 and 2001 to negotiate the sale of one or two buildings, or to agree on a long-term lease, were unsuccessful, as the amount offered by the association was insufficient for the owners.

E. 16
In 2002 the owners applied for building permits with a view to renovating the buildings. The applicant association and some of the squatters challenged the applications, but their various cases were declared inadmissible for lack of locus standi . The building permits

were thus granted and entered into force on 27 September 2005.

E. 17

On 19 October 2005 the Principal Public Prosecutor ordered the occupied buildings to be vacated as work was scheduled to begin on 22 November 2005. An appeal was lodged against the eviction order. In a judgment of 17 January 2006, the Administrative Court for the Canton of Geneva took the view, in substance, that the property owners had to bring proceedings as a priority before the civil courts to secure their rights, and that a law-enforcement measure would only be justified if the interests at stake and the seriousness of the damage incurred by them required immediate intervention that was impossible to obtain in a timely manner from the civil courts. The court further took the view that the owners had accepted the situation and had refrained from immediately exercising their right, such that the occupation was no longer causing a breach of public order.

E. 18

In its judgment of 22 June 2006, the Federal Court dismissed the public-law appeals by the owners and confirmed in substance that the unlawful occupation no longer constituted a breach of public order, on account of the time that had elapsed and the negotiations conducted by the parties, and that the owners had to take their claims to the civil courts.

E. 19

On 4 April 2005, in parallel with the eviction proceedings, the owners of the occupied buildings requested the Court of First Instance of the Canton of Geneva to order the dissolution of the applicant association and the assignment of its assets to the State, invoking the fact that it pursued an unlawful aim, in the sense that it prevented them from exercising their rights as property owners.

E. 20

The Court of First Instance, in a judgment of 9 February 2006, ordered the ex nunc dissolution of the association.

E. 21

Following an appeal, the Court of Justice of the Canton of Geneva upheld the dissolution order on 15 December 2006 but gave it an ex tunc effect, and the association was thus deemed never to have existed. It referred the case back to the court below for the appointment of a liquidator and a public body to receive the association’s assets.

E. 22

On 29 January 2007 the association lodged a public-law appeal and an ordinary appeal with the Federal Court, primarily seeking the setting-aside of the Court of Justice’s judgment and the dismissal of the dissolution action. On the same day, the owners of the buildings brought claims for possession before the Court of First Instance.

E. 23

The Federal Court upheld the decision of the court below by two judgments given on 10 May 2007. In the judgment on the ordinary appeal, it took the following position on the complaint under Article 11 of the Convention: “4.2 As regards the aims actually pursued, the applicant association refers to the commentary by Riemer (n. 41 on Articles 76-79 of the

Civil Code), which provides that in the event of unlawful acts being committed by the decision-making bodies of an association in the pursuit of its lawful aim, it is under Article 55, paragraphs 2 and 3, of the Civil Code (action for damages) and not under Article 78 thereof (dissolution of the association) that action should in general be taken. The applicant, however, overlooks the fact that the present case precisely does not concern such a situation but rather a situation of compatibility between the acts of the association's decision-making bodies and its aims (see the above-cited commentary, p. 921). Furthermore, the applicant association claims that the inhabitants have occupied the buildings at issue for a long time as a result of the tolerance of the authorities and the owners and that they should thus be regarded as having a tacitly-granted lease. That argument is, however, contradicted by the observations of the Cantonal Court, which found, in a manner that binds the Federal Court (Article 55 paragraph 1 (c) and Article 63 paragraph 2, of the Federal Judicial Organisation Act), that the members of the applicant association have been occupying the buildings without authorisation and refuse to vacate them, resisting any eviction. 4.3 Similarly, the applicant's view that the owners should have sought to fulfil their aim by another remedy (action invoking the constitutional guarantee of the right to property, actions to establish property rights) is irrelevant, since the dissolution of the applicant association, that is to say the primary occupier of the buildings according to the decision appealed against (p. 13, point 4.2.3), is in any event a legally admissible means of putting an end to the occupation. The question whether there would be other means apart from that one is unimportant in the present case. 4.4 The applicant association further alleges that, in the present case, there has been no breach of an 'objective' right, but possibly of a mere 'subjective' right. However, it disregards the fact that property is also protected against an occupation such as that in issue here by rules of objective law (Constitution, Civil Code, Criminal Code, etc.). Moreover, the present case cannot be compared with that cited by the applicant association – premises of a club built in breach of an obligation not to erect – since that had nothing to do with the aim of the association. 4.5 Referring to Anton Heini (Das Schweizerische Vereinsrecht , Basle 1988, p. 39), the applicant association further claims that to order the dissolution of an association whose activity is illegal, the illegality has to be permanent. The question whether this criterion is decisive may remain undecided, as in the case of the applicant association it is, in any event, satisfied. 4.6 In this context, the applicant refers to other aims in its constitution and complains about the failure to apply to its case Article 20 paragraph 2 of the Code of Obligations on partial nullity. The question whether that provision (in combination with Article 7 of the Civil Code) is in fact applicable to situations under Article 78 of the Civil Code is a matter of debate in legal writings (answered in the affirmative by Riemer, RDS 97/1978 I p. 95 n. 81 and Commentaire bernois , n. 40 on Articles 76-79 Civil Code; and in the negative by Heini/Scherrer, Commentaire bâlois , 3rd edition, n. 3 on Article 78 of the Civil Code; Heini/Portmann, SPR II/5, 3rd edition, n. 169; Jean-François Perrin, Droit de l'association , Zurich 2004, p. 208). The Federal Court has settled the matter in the affirmative, at least for other legal entities (Federal Court Judgment 73 II 81 concerning a foundation and Federal Court Judgment 80 II 123 concerning a cooperative entity). The question can, however, remain undecided in the present case. The Cantonal Court examined this question and arrived at the conclusion that the applicant association's unlawful aim was predominant in comparison with its other constitutional aims, because the association had been set up above all with that aim in mind. The applicant association has not disputed this, but has merely asserted that its other aims are 'essential'. Moreover, it does not claim that the conditions of Article 20 paragraph 2 of the Code of

Obligations are met, in particular that the association would nevertheless have been constituted without the constitutional clause that is null and void; it has simply claimed that it ‘could continue to operate’ even in the absence of the constitutional aim that has been declared unlawful, but that is not decisive for the purposes of Article 20, paragraph 2, of the Code of Obligations. 4.7 In this context, the applicant association further criticises, referring to Riemer (Commentaire bernois , n. 56 on Articles 76-79 Civil Code), the order for its dissolution ex tunc . Since it has, for the past 18 years, interacted with other private persons, entered into contracts, conducted negotiations and acted before the courts, only a dissolution ex nunc would be appropriate. The Cantonal Court quite rightly ordered its dissolution ex tunc , as the association has pursued its unlawful aim since its foundation (see Riemer, loc. cit. , n. 57). As to the consequences for the legal relations created in the meantime, it will be for the liquidator to decide. 5. The applicant association has, lastly, invoked a violation of Article 23 of the Constitution (freedom of association), Article 36 of the Constitution (restriction of fundamental rights) and Article 11 of the European Convention on Human Rights (freedom of association). 5.1 Since the applicant complains of an improper application of federal law that, it also alleges, has breached one of its rights under the Constitution or the Convention, the applicant is in fact invoking, as it has itself observed by referring to Fabienne Hohl (Procédure civile , vol. II 2002, p. 298 n. 3237), a violation of federal law. This complaint therefore falls within the context of the ordinary appeal. ... 5.3 Article 11 ECHR secures, in particular, everyone’s right to freedom of assembly and freedom of association (paragraph 1). The exercise of that right is, however, subject to restrictions, which, being prescribed by law, constitute measures that are necessary, in a democratic society, for national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (paragraph 2, first sentence). The Cantonal Court, based on a decisive statutory provision (Article 78 of the Civil Code), ordered the applicant association’s dissolution on account of its unlawful constitutional aim (breaching, among other things, the guarantee of the right to property under Article 26, paragraph 1, of the Constitution) and on account of its unlawful activity (occupation of property belonging to third parties). Those two situations are not covered by the guarantee of the right to freedom of assembly and association (Article 11, paragraph 1, ECHR), but fall within the admissible restrictions to that right (Article 11, paragraph 2, ECHR; see the judgment of the European Court of Human Rights of 13 February 2003 in the case of Refah Partisi (The Welfare Party) and Others against Turkey, concerning the dissolution of a political party and the right to freedom of assembly and association). The fact that in the case of the dissolution of a political party it was necessary, as the applicant alleged, to adopt particular restraint or lay down strict demands is correct (see judgment of 13 February 2003, cited above; Jens Meyer-Ladewig, EMRK , Baden-Baden 2003, n. 22 on Article 11 ECHR with references concerning the relationship with freedom of expression under Article 10 ECHR), but it is not decisive in the present case as the applicant association, in spite of a certain political component in its aim and the implementation thereof, is not a political party and, moreover, there is not a sufficiently close connection with freedom of expression”.

E. 24

On 14 May 2007 the date on which the judgment was served, the Head of the Department of Construction and Information Technology of the Canton of Geneva invited the owners to explain the fact that they had not yet made use of their building permits. The owners replied that the work could not be carried out without evicting the squatters, which they had been

trying to do for years without success.

E. 25

On 24 May 2007 the Head of the Department ordered the owners to carry out the necessary work to remedy the state of degradation of the buildings and to ensure that they were sufficiently habitable and maintained. The work was to begin within forty-five days, failing which it would be undertaken by the authorities at the owners' expense. The owners repeated that the work could not be carried out without the buildings being evicted.

E. 26

In a judgment of 26 June 2007 the Court of First Instance of the Canton of Geneva appointed a liquidator, who took various measures, in particular the freezing of post-office and bank accounts, the termination of the contract of employment of the association's secretary and a request for the restitution of fees already paid to the lawyers of the applicant association.

E. 27

On 3 July 2007 the eviction proceedings were suspended by the Court of First Instance because the occupiers, acting individually, undertook to recognise the existence of rent-based lease agreements between themselves and the owners.

E. 28

On 23 July 2007 the owners recovered possession of their occupied properties, initiating two simultaneous decisions: one, an on-the-spot police check of the squatters' identity, and the other, an order to begin the renovation work, addressed to the owners, which enabled them to recover possession with police assistance [1] .

E. 29

A number of occupiers appealed against the eviction decision to the Cantonal Appeals Board for construction-related matters. Its decision to declare the appeals inadmissible was upheld by the Administrative Court and by the Federal Court in a judgment of 12 February 2009. II. RELEVANT DOMESTIC LAW

E. 30

Articles 52-59 of the Civil Code of 10 December 1907 govern legal entities. The relevant provisions for the present case read as follows: Article 55 "The governing bodies express the will of the legal entity. They bind the legal entity by their legal decisions and by other relevant actions. The governing officers are also personally liable for their wrongful acts." Article 57 (Application of assets) "On dissolution of a legal entity, and unless otherwise provided by law, the constitution, the founding charter or the governing bodies, the assets of a dissolved legal entity pass to the public body (Confederation, Canton, Commune) to which the entity was affiliated according to its object. Such assets must be used as far as possible for their original purpose. Where a legal entity is dissolved on account of having an immoral or unlawful object, the assets pass to the public body even where otherwise provided."

E. 31

Articles 60 to 79 of the Civil Code lay down rules for associations. Article 60 reads as follows: "1. Associations with a political, religious, scientific, cultural, charitable, social or

other non-commercial purpose acquire legal personality as soon as their intention to exist as a corporate body is apparent from their constitution. 2. The constitution is produced in writing, containing the necessary provisions as to the purpose, resources and organisation of the association."

E. 32

Article 78 of the Civil Code provides for the dissolution of an association by judicial decision. This provision reads as follows: "Dissolution shall be ordered by the court, at the request of the competent authority or an interested party, where the association's purpose is unlawful or immoral." THE LAW I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

E. 33

The applicants complained that the dissolution of the Association Rhino had breached Article 11 of the Convention, which reads as follows: " 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state."

E. 34

The Government contested that argument. ... B. Merits 1. The parties' submissions (a) The applicants

E. 36

The applicants alleged that there had been no sufficient legal basis and observed that, under Article 78 of the Civil Code, the dissolution of an association was ordered by a court only when its purpose was unlawful or immoral. However, the aim of the association had always been to defend its members' right to housing.

E. 37

As regards the legitimate aim, and more specifically the protection of the right of ownership, the applicants argued that the dissolution of the association had had no legal or factual effect on the possibility for the owners to exercise their property rights. As regards the protection of public order, the applicants referred to a passage from the judgment of the Administrative Court of the Canton of Geneva of 17 January 2006, according to which public order had not been breached by the occupation. Lastly, even if the Court were to find that the occupation of the buildings had breached public order, the dissolution of the association would not be a suitable means of redress. In the applicants' submission, it now appeared that the aim really pursued by the dissolution had been to weaken the occupants and to confiscate the resources they had pooled so that they would no longer be able to defend their legitimate rights in the judicial proceedings against them.

E. 38

As to the necessity of the impugned measure in a democratic society, the applicants did not share the Government's view that the removal of properties from the market was against Swiss law. They argued that there were many properties in Switzerland to which the rules of the property market were not applicable, as a result, for example, of the federal legislation on rural land law, which removed all of the country's farmland from the market. That was also the effect of the extensive regulation of excessive rents, within the meaning of the Code of Obligations, through which the determination of the rent to be paid by tenants circumvented market forces.

E. 39

The applicants further challenged the Government's argument that the fact that the authorities had tolerated the occupation of the building for years did not mean that the occupation had become lawful. They observed in that connection that the Government had omitted to mention that the owners themselves had tolerated the occupation.

E. 40

In the applicants' submission, the Government's argument to the effect that the dissolution of the association had enabled progress to be made was not correct either. They asserted that whilst the dissolution happened to take place at around the same time as the eviction, there was no causal link between those events. The decision of the Head of the Construction and Information Technology Department of the Canton of Geneva concerned the need to commence renovation work. The fact of whether or not the association existed would have had no effect on that procedure. Thus, the dissolution of the association was neither appropriate nor necessary in order to put an end to the occupation, still less to make progress, as the Government themselves had admitted when they noted that the occupation of the properties had continued even after the Federal Court's finding that the association should be dissolved.

E. 41

In addition, in the applicants' view it could be inferred from the authorities' long-term tolerance of the association that there had been no compelling need to dissolve it.

E. 42

Neither did the applicants share the Government's argument to the effect that the dissolution of the association had not prevented its members or friends from pursuing their aims by setting up a new association. They stipulated in this connection that the dissolution of the association had had a very significant practical effect, namely the confiscation and devolution to the State of the association's assets, which had been assigned to the defence of the interests that it was defending. They noted that under Article 57, paragraph 1, of the Civil Code, unless otherwise provided by law, the constitution, the founding charter or the governing bodies, the assets of a dissolved legal entity passed to the public body to which the entity was affiliated according to its object. Article 57, paragraph 3, stated that where a legal entity was dissolved on account of having an immoral or unlawful object, the assets passed to the public body, even where otherwise provided (see paragraph 30 above). According to the applicants, it would admittedly be possible for the members to set up a new association, but extremely difficult to reconstitute assets to the extent of those that had been seized. They stated that the association, at the time of its dissolution, had had three postal and bank accounts, in which the total balance amounted to 79,144.07 Swiss francs (CHF). Moreover, the applicants did not see what guarantees could be given to the members

and friends of the dissolved association that the new one would not be dissolved in the same manner.

E. 43

The applicants further referred to the findings of a Federal Court judgment of 22 June 2006 (1P.109/2006, point 4.2) [2] to the effect that, under Article 26 of the Federal Constitution, which guaranteed private property, the cantonal authorities did not have a duty to intervene by evicting the occupants of the Rhino properties. (b) The Government

E. 44

The Government did not call into question the fact that the dissolution of the association had constituted an interference within the meaning of Article 11 § 1 of the Convention. They further argued that it had been based on Article 78 of the Civil Code, under which such dissolution was ordered by a court when the association was unlawful or immoral (see paragraph 32 above). They pointed out in this connection that the applicants could not rely on any statutory or contractual basis to justify their action. Moreover, the unlawful nature of the occupation had been confirmed by all the domestic courts.

E. 45

The Government were of the view that the interference pursued two legitimate aims, namely the protection of the rights and freedoms of others, in the present case those of the property owners and the prevention of disorder. They noted that the main aim of the applicant association was “to remove any buildings that it occupie[d] from the real-estate market and from speculation” and that active member status, with voting rights, was reserved only for those who occupied one of the three buildings.

E. 46

The Government observed that whilst it was not illegitimate to protest against real-estate speculation, the crux of the issue lay in the means used. In the light of the judgment in Refah Partisi (the Welfare Party) and Others v. Turkey [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 98, ECHR 2003 ■ II), it was necessary to examine, firstly, whether the means used were legal and democratic and, secondly, whether the proposed change in the law or the legal and constitutional structures was itself compatible with fundamental principles. In the present case, the very essence of the association’s aim, namely the removal of occupied buildings from the market, was at odds with Swiss domestic law, as were the means used; the occupation of buildings against the will of their owners was clearly in breach of the law.

E. 47

In so far as the applicants called into question the unlawfulness of the occupation, arguing that the association had not endangered the State institutions or the rights and freedoms of others, the Government observed that the occupation of the buildings had continued, even after the Federal Court’s judgment finding that the association should be dissolved. The Government admitted that there had been a consensus within the cantonal administration as to the policy of tolerance vis-à-vis the squatters, on the ground that there was no need to use police assistance to evict them from premises which were bound to remain vacant. However, the Government argued that the applicants could not now take advantage of that tolerance to prove that the dissolution of the association was not necessary within the meaning of Article 11 § 2 of the Convention. In spite of the Canton’s practice, the

occupation of the buildings had nevertheless been regarded as in breach of the law.

E. 48

The Government further pointed out that the owners had never accepted the unlawful situation but had sought, from the outset, a legal solution to the situation. Initially, immediately after the applicants had occupied the building, they had attempted to achieve this through legal channels (eviction order, never enforced, of the principal public prosecutor of 10 November 1988). Subsequently, from 1992 onwards, they had started negotiations with the association with a view to selling it the buildings or agreeing on a long-term lease. Lastly, from 2002 onwards, the owners had again started legal proceedings (application for building permit, possession applications, action for dissolution of the association, summons to pay).

E. 49

In so far as the applicants had alleged that the dissolution of the association had not been an appropriate of means of protecting the rights and freedoms of others, because it did not involve the eviction of the squatters, the Government were convinced that it was the Federal Court's judgment of 10 May 2007 confirming the dissolution which had finally enabled progress to be made. That judgment had been served on the parties on 14 May 2007 and, on the same day, the Head of the Construction and Information Technology Department had ordered the owners to carry out the necessary work. It could not therefore be doubted that the subsequent chain of events leading to the eviction had been triggered by the adoption of that judgment.

E. 50

The Government added that the dissolution of the association had not prevented its friends and sympathisers from pursuing their aims by legal means. In particular, they were free to set up a new association in the legal framework circumscribed by the Civil Code. 51. In the light of the foregoing, the Government took the view that the domestic courts, in the present case, had struck a fair balance between, on the one hand, the public interest in safeguarding social peace and "housing peace" at a time of serious housing shortage in the Geneva region, and, on the other, the owners' interest in being able to dispose of their property. After twenty years of occupation, the interference with freedom of association that was constituted by the dissolution of the association appeared as a necessary measure which served to fulfil the positive obligation inherent in the right to property. By taking that measure, the domestic authorities had not overstepped the margin of appreciation afforded to them. 52. Accordingly, the Government requested the Court to declare the present application inadmissible as manifestly ill-founded. 2. The Court's assessment (a) Whether there has been an interference 53. The Government did not dispute the point that the dissolution of the applicant association constituted an interference with its freedom of association. 54. The Court shares that view. It is not in dispute that Rhino was an association which could avail itself of rights under Article 11. In addition, it reiterates its case-law to the effect that the dissolution of an association constitutes an interference with that right (see United Communist Party of Turkey and Others v. Turkey , 30 January 1998, §§ 32-34, Reports of Judgments and Decisions 1998 ■ I). 55. Accordingly, both the association Rhino and the other applicants, who all worked for it (see paragraph 1 above), are entitled to claim that there has been an interference with their freedom of association within the meaning of Article 11. (b) Whether the interference was justified 56. An

interference will constitute a breach of Article 11 unless it is “prescribed by law”, pursues one or more of the legitimate aims referred to in paragraph 2 and is “necessary in a democratic society” for the achievement of such aim or aims. (i) “Prescribed by law” 57. The Government claimed that the impugned measure had been based on Article 78 of the Civil Code (see paragraph 32 above). The applicants argued that this provision was not specific enough to serve as a basis for the interference. 58. The Court shares the Government’s opinion and observes that the domestic courts based their decision to dissolve the association on Article 78 of the Civil Code. It takes the view that the wording of that provision is sufficiently clear for the disputed measure to be regarded as “prescribed by law”. (ii) Legitimate aim 59. The Government took the view that the interference pursued two legitimate aims, namely the protection of the rights and freedoms of others, in this case the owners of the buildings, and the prevention of disorder. The applicants disputed this assertion. They argued that the dissolution of the association had had no legal or factual effect on the possibility for the owners to exercise their property rights. Even assuming that the occupation of the buildings had breached public order, the applicants failed to see how the association’s dissolution remedied the problem. 60. The Court accepts that the association’s dissolution sought to protect the rights of the owners of the occupied buildings. However, reiterating that exceptions to freedom of association must be narrowly interpreted and are subject to rigorous supervision by the Court (see, among other authorities, Sidiropoulos and Others v. Greece , 10 July 1998, § 38, Reports 1998 ■ IV), it is not convinced that the impugned measure also sought to prevent disorder. Nevertheless, in view of the fact that the Court will not find the impugned measure to be necessary in a democratic society, it may leave that question open. (iii) “Necessary in a democratic society” (α) General principles 61. The main question to be addressed is whether the interference was necessary in a democratic society. The fundamental principles underlying this question as regards applications which, as in the present case, are lodged by associations other than political parties, have been summed up in particular in Gorzelik and Others v. Poland ([GC], no. 44158/98, §§ 88 et seq., ECHR 2004 ■ I), as follows: “88. The right to freedom of association laid down in Article 11 incorporates the right to form an association. The ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of freedom of association, without which that right would be deprived of any meaning (see Sidiropoulos and Others v. Greece , judgment of 10 July 1998, Reports of Judgments and Decisions 1998-IV, p. 1614, § 40). Indeed, the state of democracy in the country concerned can be gauged by the way in which this freedom is secured under national legislation and in which the authorities apply it in practice (ibid.). In its case-law, the Court has on numerous occasions affirmed the direct relationship between democracy, pluralism and the freedom of association and has established the principle that only convincing and compelling reasons can justify restrictions on that freedom. All such restrictions are subject to a rigorous supervision by the Court (see, among many authorities, United Communist Party of Turkey and Others v. Turkey , judgment of 30 January 1998, Reports 1998-I, pp. 20 et seq., §§ 42 et seq.; Socialist Party and Others v. Turkey , judgment of 25 May 1998, Reports 1998-III, pp. 1255, et seq,. §§ 41 et seq.; and Refah Partisi (the Welfare Party) and Others , cited above, §§ 86 et seq.). ... 92. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or

asserting a minority consciousness, are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively. ... 94. Freedom of association is not absolute, however, and it must be accepted that where an association, through its activities or the intentions it has expressly or implicitly declared in its programme, jeopardises the State's institutions or the rights and freedoms of others, Article 11 does not deprive the State of the power to protect those institutions and persons. This follows both from paragraph 2 of Article 11 and from the State's positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within its jurisdiction (see Refah Partisi (the Welfare Party) and Others , cited above, §§ 96-103). 95. Nonetheless, that power must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a 'pressing social need'; thus, the notion 'necessary' does not have the flexibility of such expressions as 'useful' or 'desirable' (see Young, James and Webster , and Chassagnou and Others , cited above). 96. It is in the first place for the national authorities to assess whether there is a 'pressing social need' to impose a given restriction in the general interest. While the Convention leaves to those authorities a margin of appreciation in this connection, their assessment is subject to supervision by the Court, going both to the law and to the decisions applying it, including decisions given by independent courts. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the national authorities, which are better placed than an international court to decide both on legislative policy and measures of implementation, but to review under Article 11 the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see, mutatis mutandis , United Communist Party of Turkey and Others , cited above, p. 27, §§ 46-47, and Refah Partisi (the Welfare Party) and Others , cited above, § 100)." (β) Application of the above-mentioned principles to the present case 62. The Court would first observe that the impugned measure consisted in the outright dissolution of the association, which was a harsh measure entailing significant consequences, particularly financial, for its members. Such a measure may be taken only in the most serious cases (see, mutatis mutandis , Refah Partisi (the Welfare Party) and Others, cited above, § 100, with references therein). The Court must examine whether this measure is, in the present case, exceptionally justified by "relevant and sufficient" reasons and whether the interference was "proportionate to the legitimate aims pursued". 63. As regards the legitimate aim of protecting the rights of others, it clearly

transpires from the various sets of proceedings brought by the owners that they complained about the occupation of their properties to the domestic authorities. After attempting unsuccessfully to obtain the squatters' eviction, they sought the dissolution of the association. Having regard to all the circumstances, the Court notes that the dissolution of the association, which is essentially a legal act, did not by itself remedy the occupation of the buildings that was claimed to be unlawful. Accordingly, it cannot be alleged that the impugned measure had the practical and effective aim of protecting the rights of the owners within the meaning of Article 11 § 2 and the Court's relevant case-law (see, mutatis mutandis , Artico v. Italy , 13 May 1980, § 33, Series A no. 37; Emonet and Others v. Switzerland , no. 39051/03, § 77, 13 December 2007; and Stoll v. Switzerland [GC], no. 69698/01, § 128, ECHR 2007 ■ V). 64. The same applies to the other legitimate aim relied on by the Government, namely the prevention of disorder. The Court, reiterating that exceptions to freedom of association must be narrowly interpreted and are subject to its rigorous supervision (see the case-law cited in paragraph 61 above), is not convinced that the dissolution of the association was necessary for the prevention of disorder, even supposing that any disorder had actually been caused by the association or its activities since its creation in 1988. 65. As to the Federal Court's argument that the question whether there were other possibilities apart from the dissolution of the association was of little importance in the present case (see point 4.3 of the Federal Court judgment, paragraph 23 above), the Court would observe that it has ruled in a different context that, in order for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned (see Glor v. Switzerland , no. 13444/04, § 94, ECHR 2009). In the Court's opinion, in order to satisfy the proportionality principle fully, the authorities should have shown that no such measures were available. 66. Accordingly, having regard to the longstanding tolerance by the authorities of the occupation of the buildings, and also to the association's declared aims, the Government have not sufficiently shown that the dissolution, which undermined the very substance of the applicants' freedom of association, was the only option for the fulfilment of the aims pursued by the authorities. In the Court's view, other measures could have been taken that would have less seriously interfered with the right guaranteed by Article 11. Consequently, the interference cannot be regarded as proportionate to the aims pursued. 67. Having regard to the foregoing, the Court is of the view that the reasons given by the Swiss courts to justify the impugned interference were not relevant or sufficient and that the measure was disproportionate in relation to the aims pursued. It finds that the dissolution of the association was not necessary in a democratic society. 68. There has accordingly been a violation of Article 11 of the Convention. II. APPLICATION OF ARTICLE 41 OF THE CONVENTION 69. Article 41 of the Convention provides: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party." A. Damage 1. Pecuniary damage 70. The applicants claimed the sum of 79,144.07 Swiss francs (CHF; about 65,651 euros (EUR)) in respect of pecuniary damage that they alleged to have sustained, corresponding to the value of the association's assets at the time of its dissolution. They submitted that this sum had been seized by the liquidator for devolution to the public authority under Article 57 of the Civil Code (see paragraph 30 above). They further claimed the sum of CHF 9,600 (about EUR 7,963) to cover a year's worth of lost earnings for the third applicant, who had been

employed by the association as a secretary on a part-time basis (12 x CHF 800). 71. The Government argued that, if the Court were to find a violation of the Convention, the association's aim could no longer be regarded as unlawful. On the basis of the Court's judgment, the applicants would be entitled to seek the revision of the Federal Court's judgment concerning the association's appeal. Thus, if the revision application were upheld, Article 57, paragraph 3, of the Civil Code would no longer apply and the alleged damage would not be sustained. The applicants' claim was therefore unfounded. 72. The Government further observed that no sum could be awarded in respect of the third applicant's loss of earnings. The applicant had failed to indicate whether he had been able to find a new job and, if so, how quickly. In those circumstances, his request could not be regarded as sufficiently substantiated. 73. As regards the request for reimbursement of the third applicant's lost earnings, the Court shares the Government's opinion that this request is not sufficiently substantiated. 74. However, it considers that the devolution of the association's assets to the public authority is clearly a direct consequence of its dissolution, which has been found by the Court to be incompatible with Article 11. The Court, moreover, does not share the Government's opinion that the applicants should look to the domestic courts, through the revision procedure, in order to seek redress for their pecuniary damage (see, mutatis mutandis , Guzzardi v. Italy , 6 November 1980, § 113, Series A no. 39, and Bozano v. France , 18 December 1986, § 66, Series A no. 111). 75. Accordingly, the Court takes the view that it is appropriate to award to the second, third and fourth applicants, jointly, the sum of EUR 65,651 in respect of pecuniary damage, plus any tax that may be chargeable on that amount, it being for them to distribute that sum among the former members of the association or to dispose of it in accordance with the association's constitution (see, mutatis mutandis , Özbek and Others v. Turkey , no. 35570/02, 6 October 2009). 2. Non-pecuniary damage 76. As regards non-pecuniary damage, the applicants were of the view that the finding of a violation would constitute sufficient redress. 77. The Court shares that view and finds that no award should be made in respect of non-pecuniary damage. ... FOR THESE REASONS, THE COURT, UNANIMOUSLY, ... 2. Holds that there has been a violation of Article 11 of the Convention; 3. Holds (a) that the respondent State is to pay the second, third and fourth applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Swiss francs at the rate applicable at the date of settlement, it being for the applicants to distribute the award among the former members of the association or to dispose thereof in accordance with the association's constitution: (i) EUR 65,651 (sixty-five thousand six hundred and fifty-one euros) in respect of pecuniary damage; ... (iii) any tax that may be chargeable to the applicants; (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points; 4. Dismisses the remainder of the applicants' claim for just satisfaction. Done in French, and notified in writing on 11 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court. Stanley Naismith Françoise Tulkens Registrar President In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pinto de Albuquerque is annexed to this judgment. F.T. S.H.N. CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE (Translation) 1. I agree with the Chamber's decision to find a violation of Article 11 of the Convention, but I do not totally espouse the reasoning given in the judgment. I would thus like to explain why I arrived at the conclusion that there had been a

violation. 2. According to its constitution, the association Rhino pursued the following aims: "... to provide its members with affordable and community-based housing, in accordance with the association-based tenancy system devised by the RHINO project. ...The Association shall endeavour to remove any buildings that it occupies from the real-estate market and from speculation. The Association shall also have the aim of promoting voluntary housing schemes; it shall establish the requisite contacts in order to inform and encourage other association-based projects. ..." 3. Article 78 of the Swiss Civil Code provides that "[d]issolution shall be ordered by the court, at the request of the competent authority or an interested party, where the association's purpose is unlawful or immoral". Having found the second declared aim ("The Association shall endeavour to remove any buildings that it occupies from the real-estate market and from speculation") to be unlawful, the national courts ordered the dissolution of the association. The Swiss courts found that the dissolution of the applicant association was the only applicable sanction in view of the predominance of the above-mentioned unlawful aim. They thus deliberately omitted to settle the difficult question whether there were options other than dissolution (see point 4.3 of the Federal Court's judgment of 10 May 2007: "The question whether there would be other means apart from that one is unimportant in the present case") and, in practice, they rejected the application mutatis mutandis to the present case of Article 20, paragraph 2, of the Code of Obligations, as requested by the applicant association (see point 4.6 of the Federal Court's judgment of 10 May 2007: "The question can, however, remain undecided in the present case. The Cantonal Court examined this question and arrived at the conclusion that the applicant association's unlawful aim was predominant in comparison with its other constitutional aims, because the association had been set up above all with that aim in mind."). 4. The Court has previously found that "exceptions to freedom of association must be narrowly interpreted, such that the enumeration of them is strictly exhaustive and the definition of them necessarily restrictive", and only "convincing and compelling reasons", corresponding to a "pressing social need", can justify restrictions on that freedom (see United Communist Party of Turkey and Others v. Turkey , 30 January 1998, §§ 46-47, Reports of Judgments and Decisions 1998 ■ I; Sidiropoulos and Others v. Greece , 10 July 1998, § 38, Reports 1998 ■ IV; and Gorzelik and Others v. Poland [GC], no. 44158/98, §§ 95-96, ECHR 2004 ■ I). That case-law thus clearly leads to the conclusion that an association having an unlawful constitutional aim may be dissolved only in exceptional circumstances, when three concurrent conditions are met: (1) the declared aim in question must run counter to national security, public safety, public order, criminal law, public health or morals or the rights and freedoms of others; (2) the dissolution must be strictly necessary, in a democratic society, to ensure that the values in question are respected; and (3) the members of the association would not have created it were it not for the said aim . In order for the dissolution of an association to be justified, the unlawful constitutional aim must therefore be connatural to the association and constitute the raison d'être of the coming-together of its members, without which it would never have been formed. Thus, where one of the constitutional aims of an association is unlawful, its dissolution must be the ultima ratio , that is to say the measure of last resort, with priority being given to the option of declaring the association's constitution partly null and void. If the association's constitutive legal instrument is vitiated in only some of its clauses, those clauses alone will be null and void, unless it can be concluded that the constitutive legal instrument would not have existed without them. Consequently, the dissolution of an association whose constitution contains an unlawful clause without which the association

would still have been formed will breach Article 11 of the Convention. 5. In the present case, the association's declared aim of "endeavour[ing] to remove any buildings that it occupies from the real-estate market and from speculation" was unlawful because it was incompatible with the guarantee of private property, which was a constitutional guarantee under Swiss law (Article 26 § 1 of the Swiss Constitution). Nothwithstanding the clever wording of the aim, the purported "removal of buildings from the real-estate market" concerned buildings that were "occupied" unlawfully in the city of Geneva. The members of the association took possession of those buildings unlawfully, by force and against the will of the lawful owners, who filed criminal complaints and sought intervention by the authorities following the occupation of their properties, then after their initial failure used the traditional legal avenue of claims for possession to put a stop to the occupation. At no time, during the period of almost twenty years in which the buildings were occupied, could the applicants avail themselves of a statutory or contractual basis to justify their occupation, since they failed to adduce evidence of a tacit lease agreement between the association and the owners (see the judgment of the Lease and Rent Tribunal of 3 September 2007) and the "tolerance" by the public authorities was not legally pertinent for the provision of a statutory basis on which to justify the occupation. Accordingly, the unlawfulness of the "occupation" of the buildings vitiated the association's declared aim of "removing" those buildings "from the real-estate market". It follows that the partial aim (of "endeavour[ing] to remove any buildings that it occupies from the real-estate market and from speculation") could not be subdivided but had to be regarded as a whole, as was rightly found by the Federal Court, which rejected the alleged distinction between, on the one hand "[the removal of the] buildings from the real-estate market and from speculation" and, on the other "the buildings that it occupies". 6. However, the one unlawful aim in question was not exclusive, nor even predominant in relation to the other aims in the association's constitution. The aim that was connatural to the association, constituting the raison d'être for the coming-together of its members, was the promotion of economic, community-based and ecological housing, according to the terms of the model lease developed by the association. Around that central aim, the association also envisaged actions of a social, cultural and even political nature, such as "encourag[ing] other association-based projects", as expressly acknowledged by the Federal Court (see the Federal Court judgment of 10 May 2007: "in spite of a certain political component in its aim and the implementation thereof") and by the Government (see paragraph 15 of the Government's observations, admitting that "some of its aims and activities were of a 'political' nature, since they contributed to a debate affecting the general interest"). The members of the association explained on many occasions that it could maintain its activity of social, cultural and political intervention on the basis of those of its constitutional aims that were not disputed by the national authorities, implying that they would still have set up the association even without the aim that was declared illegal. Clearly, the conclusion that the association would nevertheless have been set up without the unlawful clause in its constitution derives necessarily, as a matter of deontic logic, from the association's unchallenged claim that it "could continue to operate" even without the constitutional aim that was declared illegal. Such a conclusion is implicit. From that perspective, the fact that the members of the association living in the occupied buildings were the only active members of the association was irrelevant and could not be relied on to prove the predominance of the aim that was declared illegal, as the Government claimed. All the association's members, whether or not they were active and whether or not they lived in the occupied buildings, were committed to the association's

general aim of promoting association-based housing and to the underlying philosophy of an urban organisation consistent with a certain economic, community and ecological model. 7. The question whether there were other possibilities besides the dissolution of the association was thus one of crucial importance in the present case and should have been closely analysed by the national authorities, in line with the Convention principle of proportionality. The dissolution of the applicant association was not a necessary measure, because it was sufficient to declare null and void the constitutional clause that was found illegal, so that a fair balance could be struck between the right to freedom of association and the right to private property (see, mutatis mutandis , Appleby and Others v. the United Kingdom , no. 44306/98, ECHR 2003 ■ VI, a case in which the Court weighed in the balance freedom of expression and the right to private property). As an expression of the unlawful exercise of the right of association, the illegal aim of the association Rhino ("to remove any buildings that it occupie[d] from the real-estate market and from speculation") could and should have been declared null and void, which would have had the effect of guaranteeing respect for private property without negating the right of association. In spite of the fact that the right of association and the right to private property could have been reconciled in the present case, the national courts failed to weigh up the rights in question and attributed absolute predominance to one of those rights over the other, thus totally sacrificing the right of association for the sake of the right to private property. The proper procedure would have consisted in declaring null and void the only constitutional clause which constituted the expression of an unlawful exercise of the right of association and a breach of the rights of the owners of the occupied buildings. That solution would have enabled the optimisation of the conflicting rights (on the "principle of optimisation of the rights and interests at stake", which is based on the "balancing rule", see the judicious comments by Peggy Ducoulombier in Les conflits de droits fondamentaux devant la Cour européenne des droits de l'homme , Brussels, Bruylant, 2011, pp. 566 and 567). This solution was all the more necessary as the national courts had already accepted the principle of partial nullity in respect of one or more of the constitutional aims of a legal entity in the case of a cooperative entity which had a constitutional clause that was found to be immoral (see the Federal Court's judgment of 6 July 1954) and that of a family foundation purportedly set up for "maintenance", whose income, contrary to what was provided for in Article 335 § 1 of the Civil Code, was intended, without any specific apportionment, for the members of the family (see the Federal Court's judgment of 8 May 1947). As has already been shown, such case-law is not merely compatible with the Convention rule, it is even a mandatory solution under the Convention. 8. In addition, the dissolution of the association was not required by any "pressing social need". The Administrative Court had already recognised, on 17 January 2006, that "public order was no longer breached by the occupation". In its judgment of 22 June 2006, the Federal Court found to the same effect: "In those circumstances, it is not unjustifiable to consider that the owners had accepted the situation, even on a temporary basis, and had refrained from immediately exercising their right to recover possession while they looked for an alternative solution. It was therefore without any arbitrariness that the Administrative Court found that public order was no longer breached by the unlawful occupation." If there was no "convincing and compelling" reason, based on the "European democratic public order", that required the use of public force by the police against the occupation of buildings, the association's dissolution was even less necessary in a democratic society. On the contrary, the social, cultural and political nature of the association's activities should have led the authorities to weigh up the

conflicting values with restraint and flexibility. The national authorities opted for another route. The radical nature of the solution adopted by the Federal Court is shown, in practice, by the ex tunc effect of the declaration of dissolution, which retroactively applied its legal effects ab initio , that is to say, to all legal acts and agreements undertaken since the association was founded. It is difficult to understand why it took the national authorities nearly twenty years to conclude that all the association’s legal acts, contracts and activities were, since its creation, irremediably incompatible with Swiss law. 9. In conclusion, the national courts not only ignored the meritorious precedents of domestic case-law, they also disregarded the Convention principle of the optimisation of competing rights, thus breaching Article 11 of the Convention. [1] The operation to evict the occupants is the subject of another application currently pending before the Court, no. 43469/09 (see paragraph 6 above). One of the applicants, Mr Maurice Pier (third applicant in the present case), is a party to both sets of proceedings. [2] The judgment concerns case no. 43469/09 (see paragraph 6 above).